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No. 89-1079

IN THE
Supreme Court of the United States
October Term, 1989

PPG INDUSTRIES, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS*
CURIAE AND BRIEF *AMICUS CURIAE* OF
THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
IN SUPPORT OF PETITIONER**

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The Society of the Plastics Industry, Inc. (SPI) respectfully moves for leave to file the attached brief *amicus curiae*. Counsel for petitioner and respondent Natural Resources Defense Council have indicated that they do not object to the filing of this brief. Consent of respondent United States Environmental Protection Agency (EPA) has been requested but no response has been received from its counsel.

Many SPI member companies will be directly affected by the regulations at issue in this case. Like petitioner, these SPI

members will be faced with unachievable compliance requirements if the regulations are allowed to stand. Moreover, the general principles embodied in the court of appeals' decision could easily result in additional Clean Water Act regulations for which complete compliance is literally impossible.

Petitioner PPG Industries argues primarily that regulations promulgated by EPA should be held invalid because they are not "achievable" by even the "best" plant in the industry as required by the Clean Water Act. This is true because of technical limitations manifested in actual plant performance and the operation of EPA-designated control technology. Petitioner did not, however, focus on the wider impact that the court of appeals' decision will have on future regulations to which SPI member companies will be subject nor to the more general impact on all regulated industry. As an *amicus*, SPI wishes to clarify the scope of the decision before the Court and highlight the broader issue of the appropriate factual basis for establishing the parameters of best available technology under the Clean Water Act. All of these factors must be considered by the Court to assure that its opinion does not create inadvertent restrictions or interpretative problems.

Respectfully submitted,

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Interest of Amicus Curiae.....	2
Summary of Argument.....	3
Argument.....	3
I. EPA'S Failure to Promulgate Effluent Limitations Which Are "Achievable" and "Attainable" Violates Its Statutory Mandate.....	3
II. The Decision Below Creates A Conflict Between The Circuit Courts.....	5
III. The Issues Presented Are Fundamental To Ongoing and Future Clean Water Act Rulemakings.....	5
Conclusion.....	6

TABLE OF AUTHORITIES

Cases:	<u>Page</u>
<i>Association of Pacific Fisheries v. EPA</i> , 615 F.2d 794 (9th Cir. 1980).....	5
<i>CPC International, Inc. v. Train</i> , 540 F.2d 1329, (8th Cir. 1976), cert. denied, 430 U.S. 966 (1977).....	5
<i>Tanners' Council of America v. Train</i> , 540 F.2d 1182 (4th Cir. 1976).....	5
 Statutes:	
33 U.S.C. §§ 1311 and 1314.....	2
33 U.S.C. §§ 1311(b)(2)(A) and 1314(b)(2)(A).....	3
 Regulations:	
55 Fed. Reg. 80 (Jan. 2, 1990).....	6

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IN SUPPORT OF PETITIONER**

This brief is respectfully submitted on behalf of the Society of the Plastics Industry, Inc. (SPI), as *amicus curiae*. SPI supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

This case addresses the appropriate basis for establishing wastewater discharge standards that are referred to as effluent limitations. The question presented to the Court is whether certain effluent limitations are “achievable” and “attainable”

as required by Sections 301 and 304 of the Clean Water Act (Act), 33 U.S.C. §§ 1311 and 1314, when: (i) no plant in the regulated industry can comply with all of the limitations simultaneously, and (ii) inherent variability in the treatment technology will result in unavoidable violations of the regulations even at plants that properly operate and maintain EPA-designated pollution control technology.

INTEREST OF AMICUS CURIAE

The Society of the Plastics Industry, Inc. is a 2,000 member not-for-profit corporation organized under the laws of the State of New York. The Society's members include processors and manufacturers of plastics or plastics products, suppliers of raw materials, processors and converters of plastic resins, and manufacturers of accessory equipment of the plastics industry. Founded in 1937, SPI is the major national trade association of the plastics industry.

The U.S. plastics industry employs approximately 1.5 million workers. There are over 12,000 domestic plastics production facilities located throughout the 50 states. Facilities in the industry, including those of SPI member companies, typically are subject to regulation under the Clean Water Act. Many SPI member companies are subject to the particular effluent limitations guidelines at issue here, which govern the organic chemicals, plastics and synthetic fibers (OCPSF) point source category.

The issues in this case will direct the Environmental Protection Agency (EPA) in establishing and revising effluent guidelines. SPI's interests extend beyond the OCPSF guideline at issue here. For example, effluent limitations for the machinery manufacturing category are scheduled for Agency action. Thus, the Court's decision in this case or its failure

to correct the decision below will have a substantial effect on SPI and its members, both directly and indirectly. While the precise legal issue may seem narrow, the practical impact will be broad.

SUMMARY OF ARGUMENT

EPA's effluent limitations guidelines for the organic chemical, plastics and synthetic fiber point source category are not "achievable" or "attainable" within the meaning of sections 301(b)(2)(A) and 304(b)(2)(A) of the Clean Water Act, 33 U.S.C. §§ 1311(b)(2)(A) and 1314(b)(2)(A). The effluent limitations were based on a composite created by combining the best removal data for individual pollutants from different plants. Thus, no plant in the industry has demonstrated the ability to achieve the required treatment levels and no plant can comply with the regulations based on EPA's own analysis of available technology. Prior caselaw leaves room to debate whether the "achievable" and "attainable" language of the Act is satisfied by the ability of a single plant to comply or whether this must be demonstrated by the average performance of properly operated treatment technology. Additionally, EPA failed to account for the inherent variability in the use of Agency-designated technology. The guidelines are based on attainment during 95-99% of operating time, while EPA enforcement will require 100% compliance.

ARGUMENT

I. EPA'S FAILURE TO PROMULGATE EFFLUENT LIMITATIONS WHICH ARE "ACHIEVABLE" AND "ATTAINABLE" VIOLATES ITS STATUTORY MANDATE

In this case, EPA has developed daily maximum and monthly average effluent limitations for over 60 pollutants, including

28 volatile organic compounds (VOCs) typically generated by facilities in the OCPSF point source category. EPA designated steam stripping as the best available technology (BAT) for treatment of VOCs. The basic technological issue centers on a steam stripper's effectiveness in treating wastewater contaminants. A steam stripper's ability to remove any single compound depends on the characteristics of the compounds in the wastestream and the stripper's operating parameters. For example, raising the temperature of the steam stripping column may result in a greater ability to remove some compounds while at the same time decreasing the ability to remove other compounds.

In developing its standards, EPA used select data reflective of the highest removal rates achieved at different plants for 15 VOCs. As a result, regardless of how even the best plants alter the operating parameters of their steam stripping columns, they will be unable to achieve the effluent limitations for all 28 VOCs. EPA also assumed that all 28 VOCs would behave similarly to the 15 VOCs the Agency studied.

The regulations also establish acceptable levels of variability in VOC levels in wastewater to account for routine fluctuations in a plant's treatment performance and testing methods. These levels of variability are established to prevent the occurrence of unavoidable exceedances inherent in use of the EPA-designated technology. However, EPA's data on the designated technology shows that facilities will exceed the acceptable levels 1-5% of the time due to the inherent variability of the overall production and pollution control operating process. Since total compliance is required, facilities will unavoidably violate these regulatory requirements.

II. THE DECISION BELOW CREATES A CONFLICT BETWEEN THE CIRCUIT COURTS

The court of appeals permitted EPA to base effluent limitations on hypothetical performance data from a composite "best" plant created using a pollutant by pollutant analysis that disregarded the operating limitations of the Agency-designated treatment technology. This conflicts with the position of every court which previously has addressed the issue.

In *Tanners' Council of America v. Train*, 540 F.2d 1182, 1192 (4th Cir. 1976), the Fourth Circuit held that the entire set of limitations must be achievable by at least one plant. The two best plants in *Tanners' Council* each could meet limitations for one of the regulated pollutants, but neither could meet both. Likewise, in *Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir. 1980), the Ninth Circuit held that for EPA limitations to be reasonable, the "best" plants in the industry must be able to achieve all limitations using EPA-designated technology.

The Eighth Circuit also reached a conclusion consistent with that urged by Petitioner and SPI. In striking down limitations for one of the two pollutants, the Eighth Circuit held that the best plant in the regulated industry must be able to meet the effluent limitations for both pollutants simultaneously. *CPC International, Inc. v. Train*, 540 F.2d 1329, 1338-1340 (8th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

III. THE ISSUES PRESENTED ARE FUNDAMENTAL TO ONGOING AND FUTURE CLEAN WATER ACT RULEMAKINGS

The promulgation and revision of effluent limitations under the Clean Water Act is an ongoing process. For example, EPA recently issued a notice outlining its plan to review and pro-

mulgate effluent guideline regulations for over ten point source categories. 55 Fed. Reg. 80 (Jan. 2, 1990). A central issue in this process is the evaluation of available treatment technologies. Because most industry wastestreams contain multiple pollutants, it is crucial that the effluent limitations be established so that it is feasible to operate a facility in complete compliance all the time. The decision of the court of appeals in this case does not meet this clear Congressional criterion. The broad and continuing nature of the issue presented here warrants the Court's review.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari and reverse the ruling of the court of appeals.

Respectfully submitted,

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